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Val Nolan Jr.

Indiana University School of Law - Bloomington

Frank E. Horack Jr.

Indiana University School of Law - Bloomington

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HOW SMALL A HOUSE? — ZONING FOR MINIMUM SPACE REQUIREMENTS

Val Nolan, Jr. and Frank E. Horack, Jr.***

IN a recent issue of this *Review*¹ Professor Charles M. Haar criticizes the New Jersey Supreme Court for using in *Lionshead Lake, Inc. v. Township of Wayne*² “liberal shibboleths to attain an illiberal result”³ With that conclusion we disagree. In the *Wayne Township* case, upon a challenge by a local land development corporation, the trial court held that a zoning ordinance requiring a minimum of 768 square feet of floor space in one-story dwellings⁴ was “not reasonably related to the public health or general welfare of the community, but [was] arbitrary and unreasonable and not within the domain of the police powers.”⁵ The Supreme Court reversed. Professor Haar has attacked that decision as countenancing intentional “economic segregation,” “localism,” and an “isolationist view” which used zoning “to set and preserve rigidly the character of certain neighborhoods in the interest of preserving property values.”⁶ With “segregation of

* Associate Professor of Law, Indiana University School of Law. A.B., Indiana University, 1941, J.D., 1949.

** Professor of Law, Indiana University School of Law. A.B., State University of Iowa, 1926, J.D., 1929; LL.M., Harvard, 1930, S.J.D., 1931.

¹ Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953) (hereinafter cited as Haar).

² 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953).

³ Haar at 1063.

⁴ The 768-square-foot limitation was one of three; the other two applied to two-story dwellings with attached garages (1000 square feet) and without attached garages (1200 square feet). While all these limitations were challenged and upheld in the litigation here discussed, only the one-story limit affected plaintiff and received substantial attention from the parties, the courts, and Professor Haar. An occasional question on cross-examination elicited from witnesses the opinions that justifications proposed for the figure 768 square feet could not support fixing a lower figure for a house with attached garage than for a house alone; and the building inspector admitted that appearance was the factor responsible for the attached garage limitation. The trial court rejected this basis for zoning, and Professor Haar points to the two-story limits as raising doubts in his mind. Haar at 1057. The two-story building limitations do present another problem; but since they were neither the true issue in the case nor a factor in the evidence, the conclusions of the courts, or Professor Haar's real criticisms, those questions are considered no further in this comment.

⁵ 13 N.J. Super. 490, 500, 80 A.2d 650, 655 (L. 1951).

⁶ Haar at 1056, 1053, 1062.

many kinds . . . on the increase in the land-use field" and "being increasingly accomplished in terms of levels of prices and rentals . . . [e]xclusionary planning devices which are designed to accomplish such segregation should not be saved by dint of 'liberal' cosmetics or 'progressive' polish."⁷ Wayne's ordinance, as Professor Haar sees it, is another of many examples in which "[t]he physical planning movement . . . has constantly been forced to grapple with the domination over planning techniques sought by real estate interests, the very interests supposed to be controlled by these devices."⁸ These charges draw no support from the facts or the Record.

Plaintiff was Lionshead Lake, Inc., a family corporation which in 1939 bought a tract in Wayne Township and after preliminary platting and developing began to erect and sell small, low-cost houses. Most of the 68 built before the war were of a log cabin type, ranging in area between 484 and 676 square feet.⁹ Post-war plans called for 3-room Cape Cod houses¹⁰ of 484 square feet. At the time of the trial the situation in plaintiff's development stood thus: There were approximately 100 houses, half of them meeting the minimum standard, some as the result of voluntary additions by their owners.¹¹ Seventeen or more applications to

⁷ *Id.* at 1062, 1063.

⁸ *Id.* at 1062.

⁹ Lionshead Lake Corporation's activities are described in the Record (hereinafter cited as Record; page numbers are listed as they appear in defendant Wayne Township's Appendix to Petition for Certification), pp. 13a-60a, 182a-87a, 349a-52a, by its incorporator, president, and attorney, Reuben P. Goldstein. The tract was platted into some 2356 lots of 20 x 100 feet; building plots were to be at least 50 x 100 feet, or 2½ lots per plot. Of the 68 houses built by about 1942, 17 were 3-room houses (living room, bedroom, kitchen) of 484 square feet, the area measured by outside dimension; 18 were of "the small 4-room" type (living room, 2 bedrooms, kitchen) of something under 600 square feet; 22 were "large 4-room," the same rooms but 676 square feet in area. The other 11 houses were of unspecified types. *Id.* at 15a-20a.

¹⁰ The rooms were: a 14¼ x 11½ ft. living room, a 16 x 9½ ft. bedroom, and an 11½ x 6¾ ft. kitchen; there were also a bathroom and a closet. The houses met existing FHA standards for insurance. *Id.* at 23a-25a. At that time, as today, FHA space requirements were expressed in terms of room size without reference to the living area of the entire dwelling. *FHA MINIMUM PROPERTY REQUIREMENTS FOR PROPERTIES OF ONE OR TWO LIVING UNITS LOCATED IN THE STATE OF NEW JERSEY AND THE DISTRICT COVERED BY NEW YORK INSURING OFFICE, STATE OF NEW YORK, FHA Form #2245 (rev. ed. 1952).*

¹¹ The evidence on the situation in the Lionshead Lake development at the time of the trial is conflicting and difficult to interpret. Building Inspector Joseph Eichwald testified that there were 100 houses, 50 of them complying with the ordinance. Record at 199a. Reuben P. Goldstein, president of the corporation,

build complying houses had been made between passage of the ordinance and the trial.¹² About 90 per cent of the land described in the corporation's original plat was still unoccupied.¹³

Defendant Wayne Township is in area the largest municipality in Passaic County, which has a population of 337,093 and encompasses 194 square miles; in Paterson, the most populous of three cities in the county, dwell 139,336 people.¹⁴ Still largely an unsettled rural area without industrial development, Wayne's 25.34 square miles contain only 11,822 people, living in households averaging more than three members per unit.¹⁵ Most of Wayne's

first stated that there were 100 houses, *id.* at 30a, later that there were only 94. *Id.* at 184a. Of these 94, 70 were said not to comply with the ordinance, 14 complied, and 10 were in process of construction and would necessarily meet the standard. *Id.* at 184a-87a. Since the trial court's opinion recited that compliance in the several communities ranged between 50 and 100 per cent, it apparently accepted Eichwald's figure. 13 N.J. Super. 490, 496, 80 A.2d 650, 653 (L. 1951). The Supreme Court stated that of 100 houses, 30 met the requirements when built and 20 more met the requirements through voluntary additions by their owners. The court used these data to show that building activity was not frozen by the ordinance. 10 N.J. 165, 174-75, 89 A.2d 693, 698 (1952).

¹² Record at 37a.

¹³ There was no dispute that about 90 per cent of the subdivision was still undeveloped. *Id.* at 30a-31a, 241a. Lionshead Lake, Inc., however, owned only 30 per cent of the lots in 1951; the two most active members of the Goldstein family corporation had ceased to work in its behalf, one in 1945 or 1946, and the other in 1949; and in 1950 Reuben P. Goldstein had begun to liquidate its holdings. The corporation built no houses after 1949, but in 1950 it contracted to have two built for it. *Id.* at 27a-37a. Its postwar sales of houses and lots, the latter shown in parentheses, were: 1945: 2, (70); 1946: 1, (125); 1947: 8, (70); 1948: 20, (50); 1949: 0, (7); 1950: 0, (100). *Id.* at 49a-52a.

¹⁴ The United States Censuses for 1940 and 1950 show Passaic County as having 16 minor civil divisions, 10 of them boroughs, 3 cities, and 3 townships. In the following data from the same sources the old (1940) definition of urban (which tended to be narrower in that it excluded fringe areas around municipalities) is used in order to permit comparisons between figures for the two decades.

Passaic County Population	1940		1950		% increase
Rural	15,714	(5.1%)	23,629	(7%)	50.4
Urban	293,639	(94.9%)	313,464	(93%)	6.8
Total	309,353		337,093		

Wayne Township's 1940 population was 6868. The Supreme Court stated the population at the time of decision to be 11,815 (7 fewer than the 1950 census reports). 2 BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1950, pt. 30 (New Jersey) 10, 13 (1952); 10 N.J. 165, 167, 89 A.2d 693, 694 (1952).

¹⁵ Donald J. Irving, senior planning technician, Passaic County Planning Board, testified that the average Passaic County family consisted of 3.6 members in 1940 and that the average Wayne family was the same size. He did not have available the Bureau of the Census' preliminary figures for 1950, but the court permitted the

population is concentrated in a dozen or so rural and suburban communities scattered principally around the numerous lakes or along a system of small rivers traversing the township. Prior to 1930 building was confined chiefly to the neighborhood of the rivers, where main highways provided access. There colonies of cottages and cabins, most of them suitable only for summer use, grew up, many on bottom land subject to flooding. More substantial structures for year-round occupation became more common after 1930, and as the paralysis of the depression relaxed real estate developments and subdivisions contributed to the new type of growth. This tendency, its tempo accelerated during the post-war building boom, was by 1949 converting the township's population from a small seasonal one to a growing permanent one, although even then the 3714 dwellings occupied only 12 per cent of the total area.¹⁶

The change in land use that had thus taken place prior to the ordinance is in some degree indicated by statistics on the proportion of houses that already met the 768-square-foot minimum. While 70 per cent complied in the township as a whole, only 20 per cent did so in "the old part" near the rivers as compared to 100 per cent in some more recent developments.¹⁷ In large part, the ordinance zoned areas of lowest compliance for business and industry. Applications for building permits issued since 1946 revealed that only about five per cent (67 of 1305) of the new houses would have been prohibited had the size limitation been in force when they were built.¹⁸

The 768-square-foot limitation had its remote origins in Wayne's Township Committee decision in 1945 to create a Planning Board with power to seek assistance from paid experts and from a rep-

1940 data to stand in the record — their remoteness in time going only to their credibility. Record at 261a-63a. The 1950 figures are not available for Wayne Township, but census data reveal that the average population per household (a group living together in a dwelling unit, whether a related family or families or unrelated people) in New Jersey was 3.39, in Passaic County 3.26, in Paterson 3.20, and in the city of Passaic 3.23. Wayne's figure may possibly have exceeded the state total slightly, since the rural farm average was 3.58; and rural non-farm households averaged 3.37. 2 BUREAU OF THE CENSUS, CENSUS OF THE POPULATION: 1950, pt. 30 (New Jersey) xvii, 47, 71, 114 (1952).

¹⁶ See Record at 241a, 274a.

¹⁷ *Id.* at 72a-102a, 200a-15a, 233a-34a, 292a-96a.

¹⁸ In the year immediately preceding the ordinance, from June 1, 1948 to June 1, 1949, the building inspector issued 218 permits, 29 for non-complying houses. Of the 29, 14 were in Lionshead Lake. *Id.* at 239a.

representative Citizens' Advisory Committee to be appointed by the Board.¹⁹ The expert retained was Russell Van Nest Black, a professional planner of 32 years' experience, who a few months later began preparation of a master plan.²⁰ Black's submission to the Planning Board of a preliminary plan and ordinance, which expressed his "technical outside ideas" and was based upon his determination of existing land uses and all foreseeable population and industrial prospects, initiated protracted and detailed consideration. The Board met 49 times between the date it was organized and April 22, 1949, and was joined at eight meetings by the Citizens' Advisory Committee and the Board of Adjustment²¹ and at four of these eight by the Township Committee.²² During the period of adaptation of the expert's standards to the local situation, discussion of minimum size regulations lasted at least one and one-half years.²³ As a result Black's recommended 1200-square-foot limit was reduced by the Board to 700 when the new zoning ordinance was first proposed to the Township Committee on May 17, 1949. The figure was amended on June 7 to 864. Sometime after June 1, 1949 Mayor Ingram asked Joseph Eichwald, the building inspector, to examine recent building permits to learn the sizes of houses people wanted to build. Eichwald discovered a considerable range, with "the majority . . . in one scale . . . around 24 x 32 . . . [W]hen I came into the Planning Board I told them of the size and I thought it was reasonable

¹⁹ Ordinance No. 9, 1945, Township of Wayne, County of Passaic, N.J., adopted Sept. 11, 1945. See Exhibit D-33, Record at 375a-83a.

²⁰ Black had also been consultant to the State Planning Board (later the State Department of Planning) for 15 years. He had planned for Mercer County and 12 to 15 municipalities in New Jersey. His testimony, *id.* at 284a-319a, is an excellent description of the total planning process from existing use map through ordinance.

²¹ The Board of Adjustment is an administrative body which hears zoning appeals and handles variances. N.J. STAT. ANN. § 40:55-39 (Supp. 1953).

²² The Board was organized Oct. 3, 1945. At all but one of its 49 meetings a quorum was present and the minutes showed that business was transacted. See testimony of Eva T. Barclay, Secretary of the Planning Board, Record at 330a-33a. The Citizens' Advisory Committee was composed of 10 to 12 men, "householders, business men from New York, real estate men, a cross-section of the town as far as residents were concerned." This committee met with the official groups as indicated and also had separate meetings. See testimony of its chairman, S. Hobart Lockett, *id.* at 334a-41a. In addition to the meetings just described, the Planning Board members considered the provisions of Black's plan between meetings and came together prepared to discuss particular items on their agenda. *Id.* at 288a-89a.

²³ *Id.* at 237a, 340a.

because it permits the use of standard size lumber."²⁴ Objections of an undisclosed nature led to the withdrawal of the proposed ordinance on June 21; a new one introduced a week later contained the 768-square-foot minimum, the exact figure reflected in Eichwald's report and his statement about lumber dimensions. On July 12, the Township Committee adopted the ordinance unanimously, the only public objection coming from the president of Lionshead Lake, Inc.²⁵

Thirteen months later, when Lionshead Lake sued, charging that the size limitation was unreasonable, arbitrary, confiscatory, and "adopted without consideration to the character of the districts and the suitability of particular properties," it moved for and was granted summary judgment.²⁶ A reversal by the Appellate Division²⁷ on the ground that reasonableness was a matter of fact entitling the Township to produce evidence led to a three-day trial. Plaintiff presented five witnesses: its president, a general contractor, a builder and developer, a real estate and insurance man, and a civil and consulting engineer who also described himself as a land planner, but whose major activity was in private building construction.²⁸ Defendant called a public health expert, four planners (including the senior technician of the Passaic County Planning Board and the chief of the state conservation department's planning section), the head of Wayne's Citizens' Advisory Committee, a real estate broker, and three township

²⁴ *Id.* at 238a.

²⁵ See testimony of Acting Township Clerk Dorothy McDevitt, *id.* at 319a-30a.

²⁶ 8 N.J. Super. 468, 73 A.2d 287 (L. 1950).

²⁷ 9 N.J. Super. 83, 74 A.2d 609 (1950).

²⁸ Actually plaintiff called a sixth witness, Building Inspector Joseph Eichwald. When he testified that only 12 per cent of the permits issued by him had been for non-complying houses, he was immediately withdrawn as plaintiff's witness, and substantially all of his testimony was as witness for the Township. Record at 69a-71a.

Plaintiff's witnesses were Reuben P. Goldstein of Lionshead Lake, Inc.; Carl Stanley Carlson, a private builder and developer of 30 years' extensive experience; Edward J. Carter, a general contractor with six years' experience in constructing homes and other buildings; Foster Bock, a Wayne Township real estate and insurance man; and Michael A. Canger, Jr., the engineer. Mr. Canger's public experience was as borough engineer for Fairlawn for the past six to seven years and consultant to the same borough's Planning Board for the past four years. Cross-examination to determine his qualifications as an expert to speak on the quality of Wayne's size limitation revealed the absence of formal affiliation with planning groups, of formal training in any aspect of planning but engineering, of any experience in drafting planning ordinances, and of familiarity with the details of existing uses in Wayne Township. *Id.* at 173a-77a.

employees.²⁹ The trial court, finding it "difficult to perceive any genuine or material dispute" on the facts, wrote an opinion reciting the evidence at some length but quoting verbatim most of its earlier opinion ordering summary judgment against Wayne Township. The court thought that the Township's witness on public health "materially substantiated plaintiff's position, for he based his observations, not upon physical health in the ordinary and generally accepted sense of the words He freely acknowledged that physiological [sic!] and emotional needs were the essentials considered" ³⁰

The Supreme Court, in reversing, decided four questions: (1) Somewhere on the spectrum of dwelling size a point is reached where a house is too cramped for healthy occupation; (2) A municipality can, under the federal³¹ and New Jersey constitutions and the state's enabling statutes, prohibit such small houses; (3) This prohibition can reasonably take the form of a single minimum floor space standard adjusted to the needs of the average family; and (4) 768 square feet is a reasonable minimum for Wayne Township. A concurring opinion further remarked that since Wayne's governing body had exercised its best judgment for the community as a whole, "[d]ecent respect for its problems and its sincerity required that its action remain unimpaired in the absence of clear showing that it was arbitrary, unreasonable, or beyond the authority of the general Zoning Act." ³²

Two judges dissented because the effect of the majority opinion

²⁹ These witnesses were Charles-Edward Amory Winslow, the health expert; Russell Van Nest Black, Wayne's planner; Scott Bagby, partner in a New Jersey planning firm; Donald J. Irving, senior planning technician, Passaic County Planning Board; Herbert H. Smith, Chief of the Planning Section, New Jersey Department of Conservation and Economic Development; John P. Wald, a retired Wayne Township real estate broker; S. Hobart Lockett, Chairman of the Township's Citizens' Advisory Committee from its beginning; Joseph Eichwald, Wayne Building Inspector; Dorothy McDevitt, Acting Township Clerk; and Eva T. Barclay, Secretary of the Planning Board.

³⁰ 13 N.J. Super. 490, 498, 80 A.2d 650, 654 (L. 1951).

³¹ Although the complaint raised the question of constitutionality under the United States Constitution, the courts referred specifically only to the state's organic law. However, the trial court cited a United States Supreme Court case, and its opinion seems to be consistent with a decision that the ordinance violated the Fourteenth Amendment.

³² 10 N.J. 165, 179, 89 A.2d 693, 700 (1952). Professor Haar says that the concurring judge "frankly acknowledged that the ordinance was motivated by aesthetic considerations." Haar at 1056. He overlooks the fact that the acknowledgment was limited to the provisions "with respect to two-story dwellings." 10 N.J. at 176, 89 A.2d at 699.

would be to preclude those who cannot afford the minimum house from ever establishing residence in Wayne Township. "A zoning ordinance that can produce this effect certainly runs afoul of the fundamental principles of our form of government. It places an unnecessary and severe restriction upon the alienation of real estate. It is not necessary . . . in order to meet any possible threat to the general health and welfare of the community." Their views did "not prohibit minimum floor space in a house in particular districts" But they believed the uniform applicability of Wayne's minimum to an entire township of widely separated communities proved there was a failure to consider the character of the district. "Insofar as the minimum . . . requirements . . . apply to the entire community and to the plaintiff's properties in particular, they are clearly arbitrary and capricious" The dissenters also thought the majority approved certain theories (apparently as to the relation of space to health), whereas "the decision as to what the minimum square footage in a particular house should be is essentially within the legislative province, and the Legislature [has] not . . . spoken" ³³

Whether the court in fact relied on "bland generalities" ³⁴ can only be discovered by examining its decisions in the light of the record before it.

(1) *A house can be too small for health.* "While," as the trial court said, "plaintiff produced no recognized public health expert," Carl S. Carlson, the builder and real estate developer, testified at one point that minimum building size bore no relation to health, which "depends entirely almost on the disposal of sewage." ³⁵ The leading witness for Wayne Township on the question was Charles-Edward Amory Winslow, head for 30 years of Yale's Department of Public Health and Chairman for 15 years of the American Public Health Association's Committee on the Hygiene of Housing. ³⁶ His views, also the views of his committee, were that inadequate living floor space produces tensions and conflicts "between the desires and wishes of the members [of the family] who are crowded together," thus affecting mental health; tends to

³³ *Id.* at 181, 183-84, 89 A.2d at 701-02.

³⁴ Haar at 1051.

³⁵ 13 N.J. Super. 490, 496, 80 A.2d 650, 653 (L. 1951); Record at 104a. Mr. Carlson's testimony appears *id.* at 61a-63a, 102a-03a, 156a-70a, 342a-49a.

³⁶ Dr. Winslow was also a member of the League of Nations Housing Commission, Chairman of the New Haven Housing Authority, and himself the builder of 1600 homes. His testimony appears *id.* at 109a-42a.

cause a sense of inferiority in children; contributes to the exchange of communicable diseases and to accident hazards; and is therefore detrimental to "human physiological and emotional needs."³⁷ Russell Van Nest Black testified that health and building size are, beyond a minimum point, positively correlated.³⁸ The New Jersey Supreme Court "[took] notice without formal proof that there are minimums in housing below which one may not go without risk of impairing the health of those who dwell therein."³⁹

(2) *Wayne Township has constitutional and statutory authority to prevent the building of houses dangerously small for health.* On the existence of the authority to prohibit, as opposed to the reasonableness of the specific prohibition adopted, evidence was unnecessary. The court relied upon the extension of the zoning power by the 1947 state constitution, which expressly enlarges the number of considerations permissible in regulating buildings.⁴⁰ It also gave weight to a new clause commanding liberal construction of constitutional and statutory provisions concerning local governmental corporations.⁴¹ New enabling statutes confer the right

³⁷ *Id.* at 127a. He stated that he considered the most important danger of the undersized house to be the effect on emotional health. *Id.* at 133a-34a.

³⁸ *Id.* at 284a-319a, *passim*.

³⁹ 10 N.J. at 173, 89 A.2d at 697.

⁴⁰ N.J. CONST. Art. IV, § 6, ¶ 2 provides: "The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, *and the nature and extent of the uses of land*, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature." (Italics indicate language added in 1947.) It is quite clear from the hearings of the Committee on the Legislative and its reports to the Convention that the framers of the Constitution intended to enlarge the zoning power. Thus, the chairman of the committee reported to the Convention, "We have broadened the zoning provision . . ." 1 N.J. 1947 CONSTITUTIONAL CONVENTION 142 (1949). The purposes underlying the language change may be gathered from the history of the provision in the Convention. "Zoning," 2 *id.* at 1528-32; Report of the Committee on the Legislative, 2 *id.* at 1073.

⁴¹ N.J. CONST. Art. IV, § 7, ¶ 11 (1947) requires that "[t]he provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law." While this language is certainly broad enough to justify its application to the present question, in the Convention the provision was sufficiently controversial to make its purpose clear. It was designed as a home rule provision to overcome the strict construction that had

"to regulate . . . the . . . sizes of buildings" in order to "promote health . . . or the general welfare; provide adequate light and air; prevent the overcrowding of buildings." Among the factors directed to be borne in mind are "conserving the value of property and encouraging the most appropriate use of land throughout [the] municipality."⁴²

It is a little difficult to tell whether Professor Haar would deny the existence of any power to limit size, or whether he is exclusively concerned with the manner or the purpose of its exercise in this case.⁴³ Obviously if, as he seems to assume, Wayne's ordinance was prompted solely by a desire to exclude all but the wealthy, his challenge must go to the reasonableness of the township's action. But if his argument is that any ordinance provision with the effect of raising housing costs is illegal economic segregation, a large and accepted body of public regulations is questioned. Plumbing, building, and sanitary codes, subdivision controls, and improvement assessments all add to the cost of house building and thus indirectly segregate in the economic sense.

(3) *Prohibition of dangerously small houses may take the form of a minimum floor space standard adapted to the family of average size.* Plaintiff's evidence on this point consisted of Mr. Carlson's opinion that minimum building size had no relation to construction considerations or to health, nor did it have any necessary tendency to preserve property values. Michael A. Canger, Jr., the engineer, gave testimony that may be interpreted to mean that room size, not building size, determines the adequacy of living conditions for the occupants.⁴⁴

On behalf of Wayne Township, Black testified that as a planner he considered that a minimum house-size standard ought to be imposed primarily "to meet minimum health requirements." Protection of property values might have been achieved by setting a higher minimum in developments where larger houses were

prior to 1947 narrowed local powers vis-à-vis the state government. See, e.g., 3 N.J. 1947 CONSTITUTIONAL CONVENTION 508-17, 565-67, 717-22, 759-62, 836-40, 866-71, 888, 889-90 (hearings of Committee on the Legislative); 1 *id.* at 400-02, 415-16, 449-50 (discussion on the floor).

⁴² N.J. REV. STAT. § 40:55-30 (Supp. 1950); N.J. REV. STAT. § 40:55-32 (1937). Professor Haar states, despite this language, that "the constitutional and statutory provisions . . . did [not] furnish any specific guidance which compelled or even suggested the result in this case." Haar at 1053. Of course, the constitution gives no specific guidance on many accepted zoning standards.

⁴³ See, for example, the language quoted at note 42 *supra*.

⁴⁴ Record at 177a-78a.

desired; that Wayne did not use a sliding scale but selected a uniform figure reflects the fact that health was the end sought. Dr. Winslow testified that one requisite of adequate housing is sufficient space to perform the living functions carried on in the house, such as sleeping and dressing, and food preparation and preservation.⁴⁵ While the number of occupants is a necessary factor in arriving at the space needed, Dr. Winslow had no criticism of Wayne's use of a single township-wide figure since he considered 768 square feet about the space needed for two people.⁴⁶ Scott Bagby, a planner, spoke concerning this question, and he justified the device of averaging on the ground that most dwellings during their useful lives would house several families successively but that size must be fixed at the outset, bearing in mind that family composition would vary.⁴⁷ A sliding standard in terms of numbers of occupants would present serious difficulties when houses were owned by the parents of an increasing family.

To prove reasonableness by showing general acceptance, Wayne called Herbert H. Smith, Chief of the Planning Section for the New Jersey Department of Conservation and Economic Development, to present data on the extent to which the minimum floor space limitation was used in the state. Mr. Smith testified that of 138 townships responding to 250 letters of inquiry, 64 used a size limitation.⁴⁸

In holding that New Jersey's new constitutional and statutory bases for municipal zoning rendered "inapplicable" a case⁴⁹ striking a minimum height regulation as potentially a disguised cost standard, the Supreme Court said, "so long as the zoning ordinance was reasonably designed, by whatever means, to further the advancement of a community as a social, economic and political unit, it is in the general welfare and therefore a proper exercise of the zoning power." Wayne, standing "in the path of the next onward wave of suburban development," must depend in

⁴⁵ The ten functions are sleeping and dressing, personal cleanliness and sanitation, food preparation and preservation, food service and dining, recreation and self-improvement, extra-familial association, housekeeping, circulation between different parts of the dwelling, operation of utilities, and (for some households) care of infants or the ill. Record at 121a.

⁴⁶ *Id.* at 125a, 131a. See also *id.* at 139a.

⁴⁷ *Id.* at 143a-50a.

⁴⁸ *Id.* at 263a-81a, 364a-73a, especially 270a-71a.

⁴⁹ *Brookdale Homes, Inc. v. Johnson*, 123 N.J.L. 602, 10 A.2d 477 (Sup. Ct. 1940), *aff'd*, 126 N.J.L. 516, 19 A.2d 868 (1941).

large measure on its ordinance if that development is to be consistent with the statutory purposes of conserving values, encouraging appropriate land use, and preventing overcrowding. "It requires as much official watchfulness to anticipate and prevent suburban blight as it does to eradicate city slums." "But quite apart from . . . considerations of public health which cannot be overlooked, minimum floor-area standards are justified on the ground that they promote the general welfare of the community . . . [and do] much to determine whether or not it is a desirable place in which to live."⁵⁰ Implicit in the court's statement that Wayne's standard was "not large for a family of normal size"⁵¹ is recognition of the importance of correlating a size standard with a building's anticipated use and the reasonableness of expressing such a correlation in terms of the size of the typical domestic unit.

It is here that Professor Haar expresses his greatest disagreement with the court. He feels strongly that minimum floor space limits are not related to the legitimate aims of zoning. He would countenance the traditional limits on lot size despite the added costs and segregation they produce because they control density of population, "thus securing light, air, and open space . . . safety from fire, panic, contagions, and other dangers."⁵² He concludes that Wayne's ordinance "[o]n its face . . . was not formulated to promote either public health or safety, or even aesthetics."⁵³ The basis of this conclusion is not the record but the beliefs that (1) "[m]inimum requirements as to dwelling size . . . accomplish none of the traditional purposes of the zoning power;"⁵⁴ or (2) "a minimum size standard should be drafted in terms of occupancy;"⁵⁵ or (3) the legitimate zoning "considerations — health, aesthetics, property value . . . are determined . . . by the quality of the person and by the extent of the family life which is to be housed in the dwelling."⁵⁶

With these judgments we disagree. First, we believe that a minimum house requirement does accomplish traditional zoning purposes. If the lot limit is legitimate to prevent over-concentra-

⁵⁰ 10 N.J. at 172-74, 89 A.2d at 697.

⁵¹ *Id.* at 175, 89 A.2d at 698.

⁵² Haar at 1060.

⁵³ *Id.* at 1062.

⁵⁴ *Id.* at 1061.

⁵⁵ *Ibid.*

⁵⁶ *Id.* at 1062.

tion on the city block, must a community (and the courts) disregard the possibility that evils, not identical but of the same kind, may arise in the more intimate and the more important unit, the single house? The little house with its fuel storage facilities standing near it in the yard has recently become a familiar sight; it warns that contracting building size does not eliminate but only shifts outside various activities inevitably associated with family life. There is and should be room among the array of zoning techniques for both the house and the lot minimums.

Standards developed from Professor Haar's second and third propositions are impracticable. Future uses of most structures cannot be predicted with minute accuracy. At the present time if minimum size requirements are to be fixed at all, administrative feasibility demands that they be established and enforced prior to construction. Expression of minimum space standards in terms of number or quality of occupants would be nearly impossible to administer. The law is accustomed to rules adapted to fit the average situation; therefore it is not surprising to see a size limit expressed in absolute rather than number-of-occupants-per-dwelling terms,⁵⁷ so long as the figure hit upon is reasonable for the normal family. That a general regulation of any sort may produce a particular hardship has never been an objection to its validity. Particularly is this true of zoning ordinances, with the procedures available for obtaining variances in unusual cases.

(4) *768 square feet is a reasonable minimum.* Lionshead Lake first testified through its owner that the zoning ordinance "absolutely destroyed the basis of our operation . . . compelled [us] to build a house that starts with 768 square feet . . . has completely stopped the basis of our original planning and changed it over completely."⁵⁸ It then concentrated on proving that in some areas of the township most structures were sub-size and that a complying house necessarily cost more than it was reasonable to require. The cost of a complying house and lot as estimated by plaintiff's witnesses ranged from \$8500-\$9200⁵⁹ to \$9500-

⁵⁷ The trial court, however, was surprised. It said: "As the average family is comprised of 3.6 persons, defendant rather uniquely theorizes that all dwellings should be constructed for such occupancy. This would seem to require no comment." 13 N.J. Super. 490, 499, 80 A.2d 650, 654 (L. 1951).

⁵⁸ Record at 25a-26a.

⁵⁹ The \$8500-\$9200 estimate is Edward J. Carter's; Carter made an affidavit sometime before the trial at the instance of Wayne Township. The affidavit was introduced, however, and Carter was put on the stand by plaintiff; therefore,

\$10,500. Mr. Carlson gave the latter estimate for a mass-produced house; one custom-built would cost 20 per cent more, he said, and even the basic figure should be raised to \$11,000-\$12,000 if it were to reflect the rise in prices between the date of the ordinance and the trial.⁶⁰ He testified that only 30 per cent of the population could afford a house costing more than \$10,000,⁶¹ an opinion relied upon by the trial court but discounted by the Supreme Court on the ground that Mr. Carlson was "hardly qualified" to express it. Mr. Canger, asked to give his opinion as to whether a uniform minimum in Wayne Township of 768 square feet "is considered good planning," was ruled by the lower court not qualified to answer.⁶²

Wayne Township's evidence was directed toward proving that the 768 square foot figure was reasonable as a health measure; that it did not require too expensive a structure, as the volume of recent building proved; that the minimum was the product of long and careful consideration of the character of the township; that it was adapted to standard lumber lengths; and that it was lower than most of those fixed by nearby municipalities.

Regarding health, Dr. Winslow described the standards published by the American Public Health Association, which set limits varying with the number of occupants — for example, two people need 750 square feet, three people 1000.⁶³ He therefore thought 768 square feet of space to be unsuitable for more than two persons.⁶⁴ Cross-examination revealed that Dr. Winslow had not considered cost in arriving at his standards, that the space afforded in recent speculative building was only half what he believed necessary, and that the Public Housing Administration recently, as "a concession to low cost for low income families,"

the Supreme Court erred in saying that Carter was the Township's witness, and it was the plaintiff's own witness who estimated a complying house would cost between \$8500 and \$9200. *Id.* at 65a-69a.

⁶⁰ *Id.* at 102a, 162a-63a. Mr. Carlson stated that his corporation fixed its price for a mass-produced house on a cost plus 10 per cent basis. *Id.* at 167a-69a.

⁶¹ *Id.* at 103a, 170a. *Cf.* note 73 *infra*.

⁶² Record at 172a-77a.

⁶³ In the Record at 114a-23a, Dr. Winslow states the substance of the detailed space requirements set forth in AMERICAN PUBLIC HEALTH ASS'N COMMITTEE ON THE HYGIENE OF HOUSING, PLANNING THE HOME FOR OCCUPANCY 36 (1950). Without attempting a breakdown, the total figures, rounded to the nearest 50 feet, are one person, 400 square feet; two persons, 750 square feet; three persons, 1000 square feet; four persons, 1150 square feet; five persons, 1400 square feet; six persons, 1550 square feet. Record at 123a.

⁶⁴ *Id.* at 125a, 131a; see also *id.* at 139a.

had begun to approve plans calling for space about 20 per cent short of his standards.

Regarding expense, Building Inspector Eichwald testified that he had just built a complying house in Wayne; including land and his own carpenter's labor, he estimated it cost \$6800.⁶⁵ He also stated that in 1950 he issued two permits to contractors to build complying houses for Lionshead Lake, Inc., and the builders' stated cost estimates were \$7500 and \$8000.⁶⁶ Eichwald described building activity in Wayne since adoption of the ordinance. He had issued 885 building permits between July 12, 1949 and the time of the trial, an increase of more than 20 per cent over the number of dwellings in existence in 1949. The total estimated cost of those post-ordinance houses was \$9,088,460.⁶⁷ In general, Eichwald's testimony was that building had not been deterred by the new ordinance.

Comparing 768 square feet with the standards adopted elsewhere, Mr. Bagby, who thought the figure a proper minimum for a two-person family, said, "if anything [it was] a little smaller than most." Mr. Smith testified that within six miles of Wayne were six townships with minimum size limits, all but one expressed in terms of square feet. Of those using square footage, only Warrick at 725 had a smaller minimum.⁶⁸ On cross-examination, Mr. Smith said that his department in 1946 had issued a "New Jersey Code of Minimum Construction Requirements for One and Two Family Dwellings" to be used as a rule of thumb by municipalities without building codes or zoning ordinances. Its standards were couched in terms of room size, but they indicated

⁶⁵ *Id.* at 220a-21a.

⁶⁶ *Id.* at 222a-31a. Goldstein acknowledged that these two building permit applications were made on his behalf. *Id.* at 34a-37a. Mr. Carlson testified that the stated cost estimate submitted by an applicant had no relation to true cost because the building fee charged was determined by the structure's anticipated cost, based on an outmoded fee schedule. *Id.* at 160a-61a.

⁶⁷ *Id.* at 215a. In one development that had occurred since May 1950, 129 houses had been built and all but four sold. The prices for those 840 square foot houses ranged from \$10,000 to \$10,400. *Id.* at 208a, 233a. On cross-examination, plaintiff's witness Carlson admitted that he knew that some 900 square-foot houses were presently selling for \$10,900 in the Cedar Grove or Glen Garden subdivision. He then said they were cellarless and had been built and sold "last year." *Id.* at 164a.

⁶⁸ These townships with their square foot minimum standards for one-story homes were: Wyckoff, 978; Warrick, 725; Cedar Grove, 900; Verona, 900-1350; Belleville, 1600; Livingston, 1050. East Hanover had a cubic-foot standard. Record at 272a.

the acceptability of houses smaller than 768 square feet.⁶⁹ Black and Bagby agreed as planners that it was not unreasonable to have set a standard higher than that met by some existing structures, particularly in view of Wayne's great undeveloped area and the trend toward year-round houses there. To be guided solely by the smallest buildings already erected would destroy the purpose of the regulation.

Professor Haar disapproves of the 768-square-foot minimum on two grounds: (1) It is too large to be suitable for "[c]ouples, young and old, individuals, and even families who by reason of need, health, or economic status prefer a small, servantless dwelling. . . ." ⁷⁰ (2) It is not consistent with the size of existing housing in that "in some communities only 20 per cent . . . conformed" and "[i]f the desire had really been to prevent newcomers from degenerating existing standards, it would scarcely appear proper for so small a minority to set the standards." ⁷¹

The facts hardly justify these criticisms. In effect the ordinance requires simply that every new one-story house have a living area at least two-thirds as large as a handball court.⁷² Nor do public records suggest that many prospective suburbanites will be excluded from Wayne Township for economic reasons.⁷³ The second

⁶⁹ The "Code" as quoted by the trial court contained the following language: Living rooms shall have an area not less than 150 square feet, or not less than 160 square feet when dining space is included and not less than 220 square feet when dining and cooking space is included, provided that this area shall be not less than 210 square feet when located in a dwelling unit having less than two bedrooms.

The area of kitchens shall be not less than 60 square feet, or not less than 90 square feet when dining space is included, provided that the area of the kitchen shall be not less than 50 square feet when located in a dwelling unit having less than two bedrooms.

The area of at least one bedroom in each dwelling unit shall be not less than 100 square feet.

The area of any other bedroom in the same unit shall be not less than 70 square feet.

⁷⁰ 13 N.J. Super. at 496, 80 A.2d at 653. See also Record at 277-79a.

⁷¹ Haar at 1062. More burdensome to these families would be the purchase and maintenance of five-acre tracts, a restriction approved in *Fischer v. Bedminster Township*, 11 N.J. 194, 93 A.2d 378 (1952). Professor Haar's arguments against economic segregation seem more appropriate in cases of this character, although on the evidence in the *Bedminster Township* case we would not concur in them.

⁷² Haar at 1058.

⁷³ A four-wall handball court is 46 x 22 feet, an area of 1012 square feet. 11 ENCYC. BRITANNICA 142 (14th ed. 1936).

⁷⁴ While we would avoid a full-dress statistical review of the housing and income situation in the northeast New Jersey area, for we do not found our argument upon it, certain data are suggestive. We propose two tests to determine what

objection ignores the uncontradicted evidence that 70 per cent of all houses in Wayne Township complied and that non-complying structures were for the most part old and in business and industrial zones.

One further interesting question raised by the *Wayne Township* case concerns the appropriate political unit to formulate a land use plan and to effectuate that plan through zoning. Professor Haar believes the court relied on "regionalism," a doctrine exemplified in New Jersey's *Cresskill* case.⁷⁴ But, he says, there was

segment of prospective home-owners could afford to buy a 768-square-foot house at, say, \$10,000.

1. *What home-owners paid prior to 1949.* According to 1950 census data for the New York-Northeastern New Jersey area, the average debt for mortgaged residential, non-farm dwellings was \$8600 per property. 4 DEPARTMENT OF COMMERCE, CENSUS OF HOUSING: 1950 RESIDENTIAL FINANCING, pt. 2, p. 505 (hereinafter cited as CENSUS OF HOUSING). In the New Jersey portion of the area the average debt was \$5100. *Id.* at 560. The median purchase price of single-dwelling unit, owner-occupied, non-farm properties was \$8400. *Id.* at 563. But since this figure does not reflect inflation occurring after the purchases, a truer picture is derived from market value data at the time of the census. Significantly, the median market value was \$11,600. *Ibid.* More significantly still, the distribution of market values for the 175,714 houses reported reveals that the mode was \$12,000 to \$14,999 and that 123,524 had a market value of \$10,000 or more. *Ibid.* On this basis two of every three prospective purchasers could buy a Wayne Township house.

2. *What prospective home-owners can afford to pay.* There are many rules of thumb to estimate how much one can afford to pay for a house, but two rules are widely accepted. "One of these is that you can afford roughly one week's pay out of each month's salary for housing expenses. The other is that the cost of the home should not be more than 2½ times the family's income." U.S. SAVINGS & LOAN LEAGUE, WHAT YOU SHOULD KNOW BEFORE YOU BUY A HOME 9. It can be fairly assumed that the debt on a \$10,000 house might be as much as \$6000 to \$7000. (The CENSUS OF HOUSING, at 565, reported the median mortgage loan in the Northeastern New Jersey area as 74 per cent of the purchase price.) The concurring opinion in the *Wayne Township* case quotes one estimate of the average annual effective buying income of the Passaic County family as being \$6,000. Sales Management, May 10, 1952, p. 414. The median non-farm family income in New Jersey in 1950 was \$3302. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF U.S. 291 (74th ed. 1953). If such a family could spend almost \$780 a year on housing and if it borrowed \$7000 at five per cent on a 20 year loan, the equal annual payments of principal and interest would be \$554.40, leaving about \$226 for insurance, taxes, maintenance, etc. Finally, if one considers the 1949 family incomes of the 164,896 mortgagor-owners included in the Northeast New Jersey census, their median income was \$4900. Of these home-buyers 112,250 had a 1949 family income of \$3500 or more. CENSUS OF HOUSING 564. Thus, if those who have purchased in the past are indicative of future purchasers, then between two-thirds and three-quarters of the families could buy a Wayne Township house at plaintiff's price of \$10,000.

⁷⁴ The doctrine of "regionalism" has occasionally been used to save an ordinance which excluded from the municipality an unwanted but economically or socially important activity, when the court believed the economic or social region still

no showing of "coordination between the various municipalities of Passaic County," no examination of "the New Jersey regional pattern to ascertain whether the challenged legislation had preserved the [necessary] diverse living environments" "Perhaps," he concludes, "the question was not properly raised nor the necessary information provided for the court's consideration."⁷⁵

The question was properly raised. The Township's attorney presented six charts prepared by Mr. Smith to show the whole picture: "the offer is to show a picture of the zoning population, the minimum requirement with respect to dwellings in Passaic County . . . to show the general conditions that prevail for several purposes: First to show that there are a number of towns that don't have any zoning at all, which surround Wayne Township, for the purpose of indicating that there is no scarcity of places for people to go who want to build houses of any size. That is in line with the *Cresskill* decision" ⁷⁶ The charts were admitted over objection and their contents substantiated counsel's assertions.⁷⁷ The Supreme Court did not recite these facts to support reliance on regionalism simply because it did *not* invoke the doctrine. The court, therefore, did not react to an "instinct that the regionalism factor was necessary to save the ordinance."⁷⁸ Had it, as Professor Haar would wish, used a reciprocal idea of "localism" to declare the ordinance unconstitutional it would have overstepped the bounds of the judicial function. The use of re-

provided sufficient opportunity for its conduct. New Jersey's most notable "regionalism" case is *Duffcon Concrete Products, Inc. v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949).

⁷⁵ Haar at 1054-55.

⁷⁶ Record at 265a. This was no suddenly-seized-upon theory. Early in the trial defendant's counsel said in the course of an objection: "[W]e are dealing here with a comprehensive plan of zoning under a master plan, which has in mind not only this small development but the entire Township, plus its location in the County." *Id.* at 21a. See also Brief for Defendant-Appellant, pp. 35-36.

⁷⁷ The trial court admitted a chart "under the *Cresskill* Case." Record at 267a. The testimony and charts related housing and population data of the Wayne Township "region." They revealed that within two or three miles of Wayne were the municipalities of Caldwell, Montville, Kenellen, Riverdale, Butler, Bloomingdale, Wanaque, all with no zoning. *Id.* at 271a. Minimum dwelling size standards and the differing limits in the municipalities having such standards was a subject developed at length. See note 68 *supra*. It was also brought out that some nearby municipalities had no planning boards and that many did not control subdivisions. Record at 273a-74a.

⁷⁸ Haar at 1054.

gionalism to uphold legislative action is one thing, to strike it down, quite another. It may be unrealistic for the land planner to adhere to political as opposed to social and economic boundaries, but New Jersey's constitution-makers and its legislators have placed the zoning power on the municipal level. It is an altogether characteristic growth pattern for a state to deal with new and complex problems locally, through the experimental probings of the smallest units of government acting voluntarily under enabling legislation. If one believes that Wayne Township is not the proper unit of government to plan and zone, or that its minimum-size standard, applying uniformly to some 25 square miles, is too rigid to adjust to the facts of regional life, his quarrel is with the constitutional convention and the legislature, not with the court.

Hostility toward that which was novel would in the first instance have denied the power to create use districts; later the power to impose height, width, and area restrictions; and still more recently, the power to control subdivisions. This country in its constant pressure to improve standards of material living long ago abandoned (if it ever completely held) the notion that reliance must be placed solely on each person's self-generated impulse to seek a higher plane. It is entirely consistent with the spirit of our institutions for the majority through its representatives to demand conformity to new economic and social ideals and to enforce its demand with legal sanctions. And of course this involves sacrifice of other public and private values.

If there is cause for concern in the zoning field, it is in those instances where there is justification for dissatisfaction with popular participation in the process. A recent survey of zoning law in action in Chicago⁷⁹ finds that through "political pressure or personal influence" in certain areas, "if there is a plan, it is being systematically chipped away" by amendments. When a variance is sought "[p]olitical influence often determines whether Council approval is obtained."⁸⁰ Because citizen government there has been unable to cope with the situation the writer concludes "any effective solution must, within constitutional limits, place controlling authority in the hands of a technically qualified group"⁸¹ It is heartening then to observe that in Wayne

⁷⁹ Comment, *Zoning Amendments and Variations, and Neighborhood Decline in Illinois*, 48 NW. U.L. REV. 470 (1953).

⁸⁰ *Id.* at 474, 476, 480.

⁸¹ *Id.* at 483.